

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

ERASMO SILVA-FLORES,)	No. CR-F-97-5204 OWW
)	
)	MEMORANDUM DECISION AND
Petitioner,)	ORDER DENYING PETITIONER'S
)	MOTIONS FOR COURT ORDER TO
vs.)	CLERK TO PROVIDE DOCUMENTS
)	RE PETITIONER'S PROPOSED
)	SECOND AND SUCCESSIVE MOTION
UNITED STATES OF AMERICA,)	PURSUANT TO 28 U.S.C. § 2255
)	
)	
Respondent.)	
)	
)	

Petitioner Erasmo Silva-Flores, proceeding *in pro per*, has moved the Court to order the Clerk to provide him with the following documents at government expense in order for him to prepare and file a second or successive motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255:

1. Complaint and Affidavit with Assessment and Proof of Claim;
2. Indictment and any superseding indictment(s) with Affidavit;
3. Arrest Warrant with Affidavit;

4. Search Warrant with Affidavit;
5. Seizure Warrant with Affidavit;
6. Transcripts of Grand Jury Proceedings;
7. Grand Jury Concurrency Form;
8. Trial Transcripts;
9. Sentencing Transcripts;
10. Judgment and Commitment;
11. Direct Appeal and Decision Order;
12. 28 U.S.C. § 2255 proceedings;
13. Statement of Jurisdiction of the Court.

Petitioner does not assert that he has applied to the Ninth Circuit for authorization to file a second or successive Section 2255 motion.

Petitioner is serving a prison term of 240 months after a four-day jury trial in which he was found guilty of possession of methamphetamine with intent to distribute, aiding and abetting in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Counts One and Two), and being a deported alien found in the United States in violation of 8 U.S.C. § 1326 (Count Three). Petitioner was sentenced on September 8, 1998. Petitioner's conviction and sentence were affirmed by the Ninth Circuit. See *United States v. Orozco*, 1999 WL 426424 (9th Cir. May 13, 1999).

On June 19, 2001, Petitioner filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. By Memorandum Decision and Order filed on September 24, 2003, Petitioner's Section 2255 motion was denied. (Doc. 205).

1 Petitioner appealed the denial of his Section 2255 motion to the
2 Ninth Circuit, which denied a certificate of appealability on
3 February 11, 2004.

4 Petitioner asserts that he "intends to move the court
5 pursuant to 18 U.S.C. § 3582(c)(2) and United States Sentencing
6 Guidelines § 1B1.10(c), and § 4A1.1 and 2, Seeking a Modification
7 or Reduction of Sentence based upon the Retroactive Guideline
8 Amendment, concerning certain criminal History Rules that have
9 the Effect of Lowering Guideline Range and Term of Imprisonment
10 and United States v. Armstead, 552 F.3d 769 (9th Cir.2009)."

11 Section 3882(c)(2) provides:

12 The court may not modify a term of
13 imprisonment once it has been imposed except
14 that -

15 ...

16 (2) in the case of a defendant who has been
17 sentenced to a term of imprisonment based on
18 a sentencing range that has been subsequently
19 lowered by the Sentencing Commission pursuant
20 to 28 U.S.C. 994(o), upon motion of the
21 defendant ..., the court may reduce the term
22 of imprisonment, after considering the
23 factors set forth in section 3553(a) to the
24 extent that they are applicable, if such a
25 reduction is consistent with applicable
26 policy statements issued by the Sentencing
Commission.

21 U.S.S.G. § 1B1.10(c) sets forth those amendments to the
22 Sentencing Guidelines which are to be applied retroactively to
23 reduce a sentence previously imposed.

24 Although Petitioner does not specify the amendment upon
25 which he intends to rely, the only amendment to U.S.S.G. § 4A1.1,
26

1 pertaining to criminal history category, and U.S.S.G. §4A1.2,
2 pertaining to definitions and instructions for computing criminal
3 history, subsequent to Petitioner's sentencing in 1998 were by
4 Amendment 651 and Amendment 709. Amendments 651 and 709 are not
5 listed as covered amendments in U.S.S.G. § 1B1.10(c). The Ninth
6 Circuit has held that Amendment 709 is not applied retroactively.
7 *United States v. Marler*, 527 F.3d 874, 877 n.1 (9th Cir.), cert.
8 denied, ___ U.S. ___, 129 S.Ct. 427 (2008).

9 Petitioner further contends that he intends "to move the
10 Court pursuant to *Carrington v. United States*, 503 F.3d 888, 890
11 n.2 (9th Cir.2007) to attack the judgment that may have been
12 correct when rendered, but that later became incorrect because
13 circumstances that arose after the judgment was issued. 28
14 U.S.C. § 1651."

15 Petitioner's citations to *Carrington* and the All Writs Act
16 indicate that he intends to file a petition for a writ of *audita*
17 *querela*. A writ of *audita querela* is not an available remedy
18 where the claims raised would be cognizable in a Section 2255
19 motion. *Carrington*, *supra*, citing *United States v. Valdez-*
20 *Pacheco*, 237 F.3d 1077, 1080 (9th Cir.2001). Common law writs
21 such as *audita querela* and *coram nobis* survive "'only to the
22 extent that they fill "gaps" in the current system of
23 postconviction relief.'" *Id.*

24 Petitioner's motion notes that Rule 60(b)(6), Federal Rules
25 of Civil Procedure, applies to habeas cases, *Gonzalez v. Crosby*,
26 545 U.S. 524 (2005), and contends that "preparing and litigating

1 post-conviction claims sometimes require extensive factual
2 investigation, statistical analysis and therefore a movant can
3 request the Court and it is an abuse of discretion for the Court
4 to deny such a relief when the movant has made a showing of the
5 need, whether or not the government objects." Petitioner relies
6 on *Louchar v. Thomas*, 517 U.S. 314, 326 (1996).

7 *Louchar* does not support Petitioner's motion. Petitioner
8 has not filed a motion pursuant to Rule 60(b) for relief from the
9 judgment denying his Section 2255 motion.

10 The asserted grounds for relief in his anticipated post-
11 conviction motion make clear that Petitioner is not entitled to
12 production at government expense of Items 1, 2, 3, 4, 5, 6, 7, 8,
13 11 and 12. Petitioner's anticipated claims appear to pertain
14 only to his sentencing. Item 13, seeking a "Statement of
15 Jurisdiction of the Court" is meaningless and inapposite.

16 28 U.S.C. § 753(f) provides:

17 Fees for transcripts furnished in proceedings
18 brought under section 2255 of this title to
19 persons permitted to sue or appeal in forma
20 pauperis shall be paid by the United States
21 out of money appropriated for that purpose if
the trial judge or a circuit judge certifies
that the suit or appeal is not frivolous and
that the transcript is needed to decide the
issue presented by the suit or appeal.

22 However, Petitioner is not entitled to copies of transcripts or
23 other court records at Government expense until he actually
24 brings a post-conviction motion. See *United States v. Lucatero*,
25 2007 WL 1747077 (E.D.Cal.2007); *United States v. Soto-Valdez*,
26 2009 WL 1311954 (D.Ariz.2009).

1 Finally, Petitioner refers to the requirements for a Court
2 of Appeal to authorize the filing of a second or successive
3 Section 2255 motion. See 28 U.S.C. § 2244. Specifically,
4 Petitioner refers to Section 2244(b) (3) (C), which permits the
5 Court of Appeal to authorize the filing of a second or successive
6 application "only if it determines that the application makes a
7 prima facie showing that the application satisfies the
8 requirements of this subsection." Acknowledging that Section
9 2244 (b) imposes a "gatekeeper" requirement on the Court of
10 Appeal, Petitioner asserts that the "gatekeeper" requirement

11 strongly suggest[s] that the circuit court's
12 review at this stage should not resolve the
13 question whether the petition actually
14 satisfies the new successive petition
15 standard or whether some affirmative defense
16 to relief exists but only whether there is
17 some reasonable likelihood that the
petitioner - perhaps aided by an evidentiary
hearing of a sort or other fact development
procedure that only the district court can
conduct - will thereafter be able to satisfy
the new successive petition standard.

18 Again, Petitioner has not filed an application to the Ninth
19 Circuit for authorization to file a second or successive Section
20 2255 motion. Petitioner is not entitled to transcripts or court
21 documents at government expense in advance of a post-conviction
22 motion.

23 For the reasons stated:

24 1. Petitioner's motions for Court order to the Clerk to
25 provide documents regarding Petitioner's proposed second and
26 successive motion pursuant to 28 U.S.C. § 2255 is DENIED WITHOUT

1 **PREJUDICE .**

2 **IT IS SO ORDERED.**

3 **Dated: March 9, 2010**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE